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APPRAISEMENT OF REAL ESTATE FOR JUDICIAL SALE OR OTHER DISPOSAL OF PROPERTY AT PUBLIC VENDUE.

In a standard authority, Freeman on Executions, the first edition of which appeared in 1876 and the third in 1900, at § 284 it is said: "In a few of the states one of the steps toward a sale of the property levied upon is to procure its appraisement." The author's notes refer to decisions only in four or five states. In some other states there are statutes which require appraisement in the sale of deeedents' property by their legal representatives. The purpose of such a requirement has been said, in one of the latter states, in a guardian's sale, "to prevent the sacrifice to which the estates of minors might be exposed if courts were left to rely upon the interested representatives of sharks and speculators as to value." Strouse v. Drennan, 41 Mo. l. c. 298.

In 24 Cyc., page 14, it is said that: "In a number of states the statutes require an appraisement of property before a judicial sale thereof, and either forbid a sale for less than a certain proportion of the appraised value, or give the owner the right of redemption for a certain time if a specified portion of the appraised value is not realized at the sale."

In 27 Cyc. 1684, appraisement as to lands about to be sold on foreclosure of a mortgage is spoken of as required by statute, and cases from several states are cited to the text. In this volume of Cyc., under the title, "Mechanics' Liens," under the subhead, "Sale," there is no reference to appraisement. In 30 Cyc., page 273, it is said in the article on Partition that there may be appraisement for the purpose of preventing a sale, "but generally no appraisement to precede a sale in partition is required."

In Nebraska an appraisement law was said to be "designed to prevent a sacrifice of the debtor's property by providing that it should not be sold upon judicial process for less than two-thirds of the value of his interest as fixed by the appraisers." Hart v. Beardsley, 67 Neb. 145, 93 N. W. 423.

Presumably, no system of enlightened jurisprudence contemplates that debtors shall be unduly harassed, beyond any reasonable necessity, in the collection by creditors of the debts they hold against them. Therefore, the right to prescribe for sales, upon due and proper notice comes, is within the regulatory power of the state. If the state, however, should provide for the taking away of one's property under a judicial sale with little or no notice of publicity, it might well be deemed an attempt at confiscation.

However, there have been enacted in many states provisions for notifying the public, and of parties directly interested in a proposed sale under judicial process. Generally speaking, provision has not been made against property being sacrificed, where all statutory requirements have been observed. The statute assumes that by such observance a sufficient proportion of the general public will be in attendance at the sale and prepared to bid, as would bring about fair competition among would-be purchasers.

This assumption is, we think, violently opposed to the facts, generally speaking. For one to be prepared to bid he must have opportunity to examine real estate advertised for sale, for it cannot be brought to the place of sale, usually the front door of the courthouse of the county. And were this possible, advertisements often are not required to state whether it is incumbered or unincumbered. Verily, in many cases it is like buying a "pig in a poke" to buy property at a sale to which the doctrine of *caveat emptor* applies.

The courts are exceedingly jealous about irregularities attending such sales, and for fair, or a chance for fair and full, competition being assured, or possibly assured. Their practice has been greatly to magnify

the importance of small departures from strict observance of statutes, but legislatures have not seemed greatly to concern themselves to provide full, accurate and necessary preparatory steps for the conduct of a sale and protect an owner against sacrifice of his property.

The policy of protecting interests of estates and of minors represented by administrators and guardians from being sacrificed, and against mortgaged property being sold for less than a given proportion of its value, is found in many more states, than where there is provision regarding sales upon ordinary execution. And this is notwithstanding the fact that the officer conducting a sale on execution may be deemed to be acting ministerially, as has been held.

In this day and generation, when the world is flooded with so much more printed matter and newspapers than formerly was the case, it seems like an invidious distinction to prefer one sort of publicity as giving constructive notice over another. What should be aimed at in constructive notice is that the medium therefor should be something presumptively drawn to the attention of the general public and not to a limited part thereof. Or, if it affects a matter *in rem*, publication should be made where the *res* is located, or attached thereto in a conspicuous way, as say a notice of sale on the premises.

Furthermore, if trust property, such as that of decedents or minors, is guarded, and properly so, against sacrifice at public sale, by providing in advance for what is commonly understood as an upset price, why not other sales? It is familiar for decrees in chancery thus to provide, which practice goes far to show its underlying equity. But, if there be no statute specifically to guard against sacrifices in the following of a rule, shall our courts be embarrassed in inventing some such principle as avoiding judicial sales for inadequacy of consideration? Possibly we now have as much judge-made law as comfortably we may absorb.

NOTES OF IMPORTANT DECISIONS.

DUTY OWED TO INVITED GUEST BY THE OWNER OF AN AUTOMOBILE.—The Supreme Court of Michigan considers what it calls "the interesting and meritorious question in the case as to the rule of conduct" of one in control of an automobile toward a social guest, in the gratuitous service that was being rendered. Roy v. Kern, 175 N. W. 475.

Appellant contended that he was bound only to refrain from intentional injury or gross negligence, which is the equivalent of intention.

It was said the question was a new one in Michigan, but the court quotes the following from Avery v. Thompson, 117 Me. 120, 103 Atl. 4, L. R. A. 1918D 205, as stating the correct rule as to a guest:

"The thing undertaken was the transportation of the guest in the defendant's automobile. The act itself involved some danger, because the instrumentality is commonly known to be a machine of tremendous power, high speed and quick action. All these elements may be supposed to have been in the contemplation of the guest when she accepted the invitation. In a sense she may be said to have assumed the risks ordinarily arising from those elements, provided the machine is controlled and managed by a reasonably prudent man, who will not by his own want of due care, increase their danger or subject the guest to a newly created danger. In other words, we conceive the true rule to be that the gratuitous undertaker shall be mindful of the life and limb of his guest, and shall not unreasonably expose her to additional peril."

There were cited by the Maine court a great many cases, some of which may well be thought to antedate the advent of automobiles, and one case shows that in Massachusetts a different rule was declared in the case of Mascaleti v. Fitzroy, 228 Mass. 487, 118 N. E. 168, L. R. A. 1918C 264, Ann. Cas. 1918B 1,088.

This case is very elaborate in the length with which it goes into the question of the different degrees of negligence, but it seems to us to make no distinction such as is made in Hutchinson on Carriers between carriers of goods and carriers of passengers. Mr. Hutchinson says:

"The carrier of the passenger is bound to the utmost care and caution, whether paid by the passenger or not; and this distinction is based upon wholly different reasons of public policy, being in the one the value which it puts upon human life and personal safety, and in the other the necessity of preventing frauds and combinations, to the undoing of all persons who may have dealings of that kind with the carrier."

Neither in the instant case nor in the Fitzroy case is the distinction stated by Hutchinson

referred to. It may be thought, however, it is recognized, impliedly, in the instant case. But, in our opinion, it ought to be stressed as a sound rule of law. One may commit his goods to the keeping of another under whatsoever terms he sees fit, but it hardly may be thought a deliberate intrusting of his life and safety to another in the acceptance of his kindness or courtesy. There should be thought to be an assurance of care or skill in the management of a dangerous machine in which one is invited to ride. This view may be thought but an extension of the principle of the doctrine of the last clear chance, in the implied assurance that danger of that kind shall arise.

ACCIDENT ACCELERATING DEATH NOT SOLE PROXIMATE CAUSE THEREOF.—Two recent decisions, one by the Supreme Judicial Court of Massachusetts and the other by the Supreme Court of Georgia, treat a question of great importance in accident insurance law, and, as they rest on not wholly dissimilar facts and reach directly opposite results, are hereinbelow contrasted. Leland v. Order of United Commercial Travelers, Mass., 124 N. E. 517; Pacific Mut. Ins. Co. v. Meldrim, Ga., 101 S. E. 305.

The facts in the Leland case show that deceased insured was a commercial traveler, apparently in good health, and had been for several years. In the morning, as he was going from his cellar to his room upstairs, he tripped and fell twice, becoming unconscious. He was assisted to his bed, regained consciousness, complained of pain in his right side, was treated by a physician, had difficulty in breathing and died that evening. An autopsy revealed heart and lung and other lesions in his system. Physicians testified that death resulted from heart failure at the time of the fall, his heart being pre-disposed to such failure from shock or over-exertion.

The Court said: "The deceased confessedly was suffering from disease or diseases which actively co-operated with the fall causing death. The disease and the fall were concurring, efficient and proximate causes in producing death. Either alone without the other would not then have resulted fatally. It cannot be held, with any due regard to the meaning of words in the contract here sued upon, that the death of the insured resulted from the accident 'alone and independent of all other causes' as 'the proximate, sole and only cause.'"

In the Meldrim case the facts need not be expressly set out to understand the particular bearing of what was said by the court. The policy provided for an exception as to death not resulting "directly, independently and exclusively of all other causes in death."

The Court stated that if such a clause were given "absolute literal meaning," the policy would be worth nothing to an insured.

In support of this statement it quoted as follows from a prior decision by Georgia Supreme Court:

"To hold in any case that a contract which stipulates that the loss for death should be payable only when the loss results solely and exclusively from an injury would be to hold that death must, in every case, be instantaneous and the immediate effect of the injury in question, for it is a matter of common knowledge that almost every human being has some weak spot in his organism, which might to a larger or smaller degree contribute to bring about death in a particular way in that particular case, although another person under the same circumstances might not have died. Except in the case of a human being who is in perfect health, or unless death is instantaneous, death never supervenes when it cannot be said that there was perhaps more than one cause which contributed to the fatality."

While it may be that the Georgia court states the matter too extremely, yet it ought to be thought that accident insurance companies in insuring against accidental death do take risks among people as they ordinarily appear, or, as may be, they are. They are not selected risks on a basis of health, or upon activity, strength or age. And we believe they are not particularly graded on any basis of this kind. Our inclination, upon the whole, is rather towards the Georgia, than the Massachusetts, ruling. Certainly it is not to be thought the policy is to be taken in a strictly literal way.

THE DISTINCTION BETWEEN COLLATERAL AND DIRECT ATTACK UPON A JUDGMENT.

The word "collateral" as applied to an attack upon a judgment has been used with less discrimination between it and its antithises than any other word in legal phraseology.

The meaning which has been given to the word collateral by lexicographers and the sense in which the word is used by bankers, in reference to securities, are responsible in a great measure for the confu-

sion which has arisen in attempting to distinguish between the two kinds of attacks that can be made upon a judgment. As applied to an attack upon a judicial proceeding, the word collateral has a separate and distinct meaning from that given by the lexicographers, and different from that which it carries with reference to securities, and courts and text writers have so often referred to a direct assault upon a judgment as being a collateral attack that practitioners sometimes fall into an erroneous idea, that a collateral attack upon a judgment is any proceeding to set it aside, other than by a motion for a new trial or by appeal. If this were true, there would be no way to escape the effects of a void judgment after the time for taking an appeal had expired, and a void judgment would have the same force and strength of validity that a valid one would have. A valid judgment would stand upon its merit, while a void judgment would stand because it could not be attacked. There are two distinct methods of procedure by which a false judgment can be exposed. In one proceeding the record can be flatly contradicted, while in the other proceeding the record must be accepted as true.

A judgment is the final adjudication and determination by a court of competent jurisdiction of the rights of the parties to an action in and to the subject-matter of the litigation. If it is for money, it is a debt of record. If it is for a lien on property, it is a lien of record, and, if it is for property, it is a title. If it is rendered in an action for money and is a denial of the plaintiff's right to recover, then it is a shield for all time and a protection to the defendant against the assertion of any further claim of the plaintiff in any court.

There are two kinds of judgments: Judgments are either *in personam* or *in rem*. They are *in personam* when the proceedings are again the person of the defendant. A judgment *in personam* is a contract, a fixed liability, which follows the party against whom it is rendered into any and every part of the world. A judgment *in rem* is not a fixed liability against the defendant, but is an adjudication pronounced upon the status of some particular subject-matter. It gives one party a title to, an interest in, or a lien upon some particularly described property owned or claimed by the other. A judgment determines and forever settles the rights of the parties to it. It is absolute, incontestable, and irrevocable, and can never again be called into question by any court, either domestic or foreign. Such an absolute and irrevocable determination of the rights of men can only be made by a court of competent jurisdiction and in a proceeding free from fraud.

While the Constitution provides that full faith and credit shall be given in each state to the judicial proceedings of every other state, to entitle a judgment to this unquestionable recognition, it must really be a genuine judgment. A void judgment is not a judgment; and to determine whether a judgment is valid or void is simply to determine whether it is or is not a judgment. A void judgment is entitled to no faith or credit anywhere. It can neither give a right nor take one away. The full faith and credit clause of the Constitution does not prevent an inquiry by the courts of a state into the jurisdiction of the court in which a foreign judgment is rendered.

By an Act of Congress, known as the Authentication Act, the records and judicial proceedings of the courts of any state or territory shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, when there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.

The courts of one state may inquire into the right of another state to exercise authority over the parties to a judgment and the subject-matter of the action, and they may also determine whether the judgment is founded in and impeachable for a manifest fraud. In the very instructive case of Cole v. Cunningham,[1] the Supreme Court of the United States, speaking through Chief Justice Fuller, said: "The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. Therefore, it must be understood that the public acts, records and judicial proceedings referred to in the full-faith-and-credit clause of the Constitution are such as are made or had in courts of acknowledged jurisdiction. The faith and credit to be given to the judgment of a court of one state by the courts of another, is that same faith and credit that it would receive in the state in which it is rendered."

A court of competent jurisdiction of any state, having jurisdiction of the parties, would have the same unquestionable power to cancel a void judgment or one steeped in and impeachable for fraud, that it would have to cancel any other kind of a contract; and such courts may pass upon, fix and determine the rights of the parties the same as if no judgment had ever been rendered in the first place. This puts the proposition a little stronger than I have ever seen it put by any of the courts or authors, but, nevertheless, it is true.

In the case of Dobson v. Pearce,[2] cited with approval by Chief Justice Fuller, the plaintiff, in a judgment recovered in New York, brought an action upon it in the Supreme Court of Connecticut, whereupon the defendant in the judgment filed a bill against the plaintiff on the equity side of the same court, alleging that the judgment was procured by fraud and praying for relief. If he had merely defended against the New York judgment, upon the grounds that the judgment was procured by fraud, then his attack would have been a collateral one, and he would have been confined to the record alone for his evidence; but he made a direct attack upon the judgment in a separate suit filed on the chancery side of the court, and was permitted to go outside of the record and prove that the judgment was obtained by fraud. The plaintiff in the judgment appeared in and litigated the equity suit, and the Court adjudged that the allegations of fraud in obtaining the judgment were true, and enjoined him from prosecuting an action upon it. He assigned the judgment and it was held in a suit in New York, brought thereon by the assignee, that a duly authenticated copy of the record of the decree in the Connecticut Court was conclusive evidence that the judgment was obtained by fraud. This is no conflict of law nor conflict of jurisdiction, because the New York judgment was not a judgment. Any court in which a judgment is offered may call for an authenticated copy of the record for the purpose of ascertaining and passing upon the jurisdiction of the court in which the judgment was rendered.

The courts have had some trouble in determining just what jurisdiction is. Chief Justice Green, of New Jersey, has said that jurisdiction is simply power.[3] Judge Van Fleet says that this is the best definition that he has ever seen. The word power may define jurisdiction more accurately than it can be defined by any other single word, but this word alone cannot possibly define it. In the early case of United States v. Don,[4] the Supreme Court of the United States, speaking through Judge Baldwin said: "The power to hear and determine a cause is jurisdiction." From the language of the Court in this case, jurisdiction was defined to be the power to hear and determine. After

(1) 133 U. S. 107.
(2) 12 N. Y. (2 Kernan) 156.
(3) Perrine v. Farr, 22 N. J. L. (2 Zalr.) 356, 365.
(4) 6 Peters 691.

this definition had been quoted and approved by all the Supreme Courts of the land, learned and repeated by law lecturers of all the universities and law schools, and memorized by law students, in the case of *ex parte* Reed,[5] the Court said in an *obiter dictum* not called for by the facts in the case: "We do not overlook the point that there must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause." From this remark of the Court the definition of the word jurisdiction has since been defined by text-writers as "the power to hear and determine the cause and to give the judgment rendered." While this enlargement may be a little more explicit and may more readily carry a correct idea to the mind of the student, and even the practitioner, yet it adds nothing to the first definition of the Court. The judgment of the Court is really the determination of the cause.[6] There can be no determination of the cause until the judgment is rendered. Courts do not try cases merely to ascertain what ought to be done. They try cases to ascertain what shall be done. If a court should be permitted to hear a cause and simply decide in his own mind what ought to be done, and then stop, the trial would be a farce. The cause is not determined until he renders his judgment, and the giving of the judgment is a determination of the cause. So the definition of Judge Baldwin, in the 6th Peters, will be found to express all the elements of jurisdiction.

It is not the hearing of the cause nor the mere ascertainment of the rights of the litigants that affects the parties to a lawsuit. It is the judgment given that affects the parties, and, if this is void, the jurisdiction to hear is of little or no importance. In determining the validity of a judgment, we are often led into a state of confusion from a mistaken conception that jurisdiction depends upon facts or the actual existence of matters and things instead of upon the allegations made concerning them. In some cases, the jurisdiction of the court depends upon the existence of facts, and if, upon a trial of the case, the jurisdictional fact is not established by proof, the plaintiff's case falls for want of jurisdiction in the court to hear and determine his cause. This is true in a proceeding for a divorce under those statutes providing that the plaintiff, to obtain a divorce must have resided within the state in which he seeks relief for a definite period before the commencement of his action. If he fails to establish proof of his residence for the required period, by competent evidence, he must fail in the prosecution of his cause for want of jurisdiction in the court to hear his cause.

On the other hand, a court of original jurisdiction may be without power to entertain a suit for a sum below a certain amount. As in Arkansas, no suit can be brought in the Circuit Court upon a contract for an amount not exceeding $100.00, exclusive of interest. If a party brings a suit in the Circuit Court of Arkansas upon an account, stating in his complaint that the amount in controversy is $50.000, he will state himself out of the jurisdiction of the court, and the court will refuse to hear his cause for want of jurisdiction; but if the court should hear the cause and give judgment, this judgment would be rejected as void wherever it might be offered. But if such party, without any intent to deceive or impose upon the court, states in his complaint that the defendant owes him $1,000.00, the court will take jurisdiction upon the statements contained in the complaint and not upon the facts as they may actually exist, and the court will hear his cause. If it is shown by the proof that he is entitled to recover only $50.00, the court will give him judgment for that sum, whereas it would have refused to entertain his suit at all in the first instance if he had stated that the defendant owed him only $50.00.

When jurisdiction depends upon the existence of a fact and not alone upon the

(5) 100 U. S. 13-23.

(6) Words and Phrases, Vol. 4, p. 3235.

allegation of a fact in the complaint, the court may hear and pass upon the issue tendered as to the existence of the jurisdictional fact, just as it may pass upon any other issue. Thus, in a proceeding for a divorce, where the plaintiff alleges that he has been a resident of the state for the required time, and this allegation is denied by the defendant, and the court having jurisdiction of the parties decides that the allegation is true, the issue as to this fact can never again be questioned in any other court, for the reason that both parties have had their day in a court of competent jurisdiction, and the question has been finally passed upon and determined. If, however, the plaintiff imposes upon a court and deceives the tribunal into a belief that the jurisdictional fact exists, and secures his judgment through default of the defendant, his judgment will be impeachable in any court of competent jurisdiction for fraud.

A domestic judgment of a court of general jurisdiction, whether the record shows jurisdiction affirmatively or is silent upon the subject, is not subject to collateral attack based upon extrinsic evidence showing want of jurisdiction.[7]

Judge Van Fleet, in his work on Collateral Attack, defines a direct attack on a judicial proceeding to be an attempt to avoid or correct it in some manner provided by law, and he defines a collateral attack as an attempt to avoid, defeat or evade it or to deny its force and effect in some manner not provided by law. I fail to see that either definition is wholly correct. A direct attack is never made merely for the purpose of avoiding a judgment, but it is always made for the purpose of destroying it.

Legal questions may come together like the meeting of land and sea, making a line of demarkation that cannot be crossed without a full knowledge of its presence. They sometimes, however, come together like the blending of the parched sands of Sahara with the tropical verdure of the Soudan; one side, gradually and almost imperceptibly, passing from the traveler's view, while the other side, as if by a process of dreamy imagination, rises slowly to his vision. The distinction between a direct attack and a collateral one may, on first view, seem to be of the blending kind. But when the distinguishing principles between them are known and understood, it will be seen that they meet like land and sea, and without the least difficulty the practitioner cannot help but see just how far he can walk and just where he must take a boat.

A void judgment may be defeated in a collateral attack, but, like a false witness, when so defeated in one case, it may appear dressed in the full gloss of validity in another case and necessitate another examination as to its character and credibility. But a direct attack is a proceeding to strike it dead.

Some of the courts have said that a direct attack is one in which the recitals of the record may be contradicted, and that a collateral attack is one in which the recitals of the record must be accepted as true. This prescribes the rule of evidence in a direct attack and in a collateral attack, but it does not define the distinction between them. If this should be accepted as a correct definition, then it would be within the power of a judge to exclude all evidence in any case except the record, and by so doing he would make the attack a collateral one. In any other case in which he might see proper to admit evidence *aliunde*, he would by his ruling make the assault a direct attack.

Confusion sometimes arises from a misunderstanding as to what the record in a case is. The record consists of all papers filed and all entries made upon the dockets and journals of the court, and, if these show that the court had jurisdiction, another court will not undertake to inquire into the truth of this showing through other or outside evidence, except in a direct proceeding

(7) Townsley-Myrick Dry Goods Co. v. Fuller, 58 Ark. 181.

to contradict the record and show that the judgment is void.

It has been said that an attack upon a judgment in the wrong court or by the wrong party is a collateral attack. I do not think so. It occurs to me that any attack upon a judgment for the direct purpose of having it canceled, annulled, modified or vacated, whether with or without merit, before the right court or wrong court, or by the right party or by the wrong party, is a direct attack upon the judgment. I do not think that a mistake of a litigant as to his right to assail a judgment, or his error in going into the wrong court, or an error as to the merits of his case, would affect the character of his attack. If the wrong party brings a suit he will lose, of course, for the reason that he has no right to bring it. If he gets into the wrong court, he will lose for the reason that he has taken the wrong course, and, like a traveler who has taken the wrong road, cannot reach his destination; and, if his case is without merit, he will fail through the prevailment of justice, but neither of these errors would change the character of his assault.

I have said that a void judgment is no judgment, and that it can neither give a right nor take one away; but under the decisions of the courts of many states this is not literally true. The court of Arkansas, for instance, refuse to give relief against a void judgment, unless the assailant of the judgment alleges and proves a meritorious defense to the original proceeding in which the void judgment is rendered.[8] The rule of procedure is first to ascertain whether there is a valid defense and then to pass upon the validity of the judgment. If it is adjudged that there is no valid defense to the action, then the void judgment will not be disturbed. I have never been able to see the wisdom or correctness of this interpretation of the law and the reasoning of the courts in support of it is not convincing.

(8) Gates v. Hays, 69 Ark. 518; State v. Hill, 50 Ark. 458.

(9) McKee v. Angel, 90 N. C. 60-62.

A void judgment is one which has only the form and semblance of a judgment; as if rendered by a court having no jurisdiction.[9] It is a judgment in name and form only.

Mr. Freeman, in his work on judgments, says: "A void judgment is in legal effect no judgment. By it no rights vest. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. The first and most material inquiry in relation to a judgment or a decree then is in reference to its validity, for, if it be null, no action upon the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislature or other part of the government can invest it with any of the elements of power or vitality."

This is the universally recognized effect of a void judgment, yet if a party, by imposition or deception upon a court, or through any other means can succeed in obtaining a void judgment in Arkansas, he is permitted to enjoy the full benefits and fruits of a valid judgment as if rendered in a wise and honest proceeding, until the defendant appears in court and establishes a valid defense to the wrongful and void proceedings. This enables a litigant in Arkansas, by imposition and fraud upon the court, to take a judgment against an absent defendant, and then compel the defendant to come into the courts of Arkansas and litigate his cause before he can be relieved of the burdens of a void judgment; and, if he fails to do so, his rights must suffer the same as if a valid judgment had been rendered against him. By imposition and deception successfully practiced upon a court, one party can bring another into the local

courts of Arkansas from the most distant parts of the world and compel him to assume the burden of proof and submit to a foreign jurisdiction attended by all its hardships and inconveniences.

An evil almost as great prevails in the state of Iowa and in some of the other states. In Iowa there can be no special appearance in a cause for the purpose of challenging the jurisdiction of the court, and if a party appears for the purpose of challenging the jurisdiction, he is deemed to be in court for all purposes. When a personal action is commenced in any of the courts of Iowa against an absent defendant, and he appears for the purpose of challenging the jurisdiction of the court, he is deemed to be in court for all purposes and must make his defense to the action. On the other hand, if a void judgment is taken against him and he appears in one of the courts of the state to have that judgment set aside, he can be met by a cross-complaint or a counterclaim, setting up the original cause of action upon which the void judgment was rendered.

Thus, it will be seen that the courts of Arkansas and Iowa, in an attempt to do substantial justice, extended their jurisdiction to every part of the world and have made it possible for an absent defendant to be brought into the courts of these states to answer to a void proceeding or to litigate the justice of a cause of action upon which a void judgment has been rendered. This rule is destructive of the principles upon which our government was originally founded, and is but little short of one of the serious wrongs which Jefferson charged against King George the Third, in the Declaration of Independence,—that of "transporting us beyond seas to be tried for pretended offenses." A man should know just where he can be sued and to what jurisdictions he owes his allegiance.

It is really the intent of all courts and lawyers of true merit and ability to avoid and obviate the necessity for litigation, but in an attempt to do substantial justice, I fear that these courts have swept away a most wholesome principle of law as a useless technicality.

When a party goes into the courts of his country for relief, he should be required to go into a court of competent jurisdiction, and he should be required to make his selection at his peril and should not be allowed to harass and annoy even the most culpable legal sinner in a court that has no jurisdiction of the case; and when he goes into a court without jurisdiction, the full penalty of his error should fall upon him alone, and even a defendant against whom he has a just and meritorious cause of action should not be made the victim of his folly. It is enough that a party shall answer in a court where he ought to answer, but it is too much to require him to respond to the wrongful action of a party brought in a foreign court that has neither jurisdiction of his person nor of his property.

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JUDGE-MADE LAW.

This term is used to describe that not inconsiderable portion of our law which is gradually being developed by judicial opinion. The subject has recently been receiving renewed attention, probably because of the numerous war emergency laws which have put more than normal power in the hands of the executive.

The matter may be regarded in either of two ways, either narrowly and critically, or liberally. As an example of the former there is Bentham, who referred to judge-made law as "that spurious and fictitious kind of law, if such it may be called, with the dominion of which so far as it extends all security is incompatible." There is no lack of argument in support of this position. The distinction between legislature and executive is undoubtedly sound. The one should make laws, the

other apply them; the two provinces are distinct. Where a statute or a well-defined rule of the common law gives a positive command, creates a clear right, or imposes a definite disability, he who has to administer the law must obey it literally and exactly. Many laws, such as the rule of primogeniture, are conceived rightly or wrongly as being in the interests of the community and to be effective must be applied without exception or reserve, though in many individual cases the "fundamental principles of justice" appear to be outraged.

It is, generally speaking, for the lawgiver, not the judge, to consider these fundamental principles. Arbitrarily to depart from definite legal rules is to go backwards. Progress in law has been from the individual despotic judgments the "themistes," or "dooms," or archaic communities to the generality and certainty of the legislation of advanced societies.

The fundamental principles of justice are perhaps not difficult to ascertain. They seem to be summed up concisely in the opening paragraph of Justinian's Institutes: "Justice is the fixed will always to give each his due." The hard part is to determine what is any particular man's due and that determination will inevitably vary according to the mentality of the judge, even assuming every judge to be perfectly honest and unbiased in the usual sense of that word. To reduce the variation within the narrowest limits is the province of legislation. Legislation in this country, Dicey asserts (and to our thinking proves his assertion), lags behind general public opinion. It demonstrably does not lag behind judicial opinion: it is the new-fangled laws which try the mettle of the judge, and unhappy would often be the state of the suitor if a long tradition of observance of the law, however repugnant to the judge, had not made an impartial hearing fairly secure. It is wicked to "decree injustice by a law." It would lead to utter confusion to allow the judge free hand to right injustice as he thought fit.

We notice that in a recent lecture on "Judicial Law-Making," in University College, London, Sir John MacDonnell, the Professor of Comparative Law, put forward a "reasoned plea in defense to a certain extent of the practice of extending legislation by judicial interpretation. His arguments may be summarized as follows:

The legislature, however careful and provident, could not fully foresee the course of events; could not provide for the infinite changes which would occur; could not guard against the shifting meaning of words, as well as the complexity of affairs. The fact was that the so-called "intention of the legislature," and the same might be fairly said of the "will of the legislature" and the like expressions, were often legal fictions: the legislature had no clear "intention," the people no will, in regard to questions or situations which had not arisen and could not be foreseen. The consequence deducible from so-called "intention" might become strange when applied to a law or constitution some centuries old, or to one dating from a period wholly different from ours. Great judicial discretion, in effect the power of making law, was recognized by some codes. Thus, in one of the latest and most carefully prepared codes, the Swiss Civil Code, it was in terms stated that "the Civil Code applies to all cases in which it contains provisions either according to its letter or its spirit. If the Code contains no provision applicable to the question at issue the judge shall decide according to customary law, and where it is also absent according to recognized legal doctrine and science. In the absence of these sources he shall render judgment accordingly in accordance with such rules as he would enact if he were legislator." According to the Australian

Civil Code, "Where the case cannot be decided according to the literal text or the natural meaning of a statute, regard shall be had to analogous provisions chiefly contained in the statute and to the principles applying to similar matters. If the case is still doubtful it shall be decided, after carefully collecting and considering the principles of natural justice." He thought he would be right in saying that the most conspicuous example of a judicial law-making which the world had seen was to be found in the jurisprudence of the United States. He did not refer to the doctrine first fully developed by Marshall of the supremacy of the judiciary over the legislature when the latter overstepped the limits set by the Constitution, though the doctrine necessarily armed the former with immense powers exercised in the name of interpretation. He had specially in mind the doctrine more recently and at present being rapidly evolved of so-called "police powers," in virtue of which the American bench was called upon to decide the most important questions of public duty, to declare this statute valid, and that inoperative; in short, to determine the limits of modern legislative activity. In virtue of these powers the American judiciary had built up a body of law far surpassing in volume and novelty the additions in recent times made by English judges. Having considered the question of what, according to the decisions of the United States Supreme Court, was meant by "police powers," the lecturer said that a warm advocate of judge-made law had said: "There is no guaranteeing of justice except the personality of the judge;" and these words came near the truth. There was growing up a form of equity, none the less real because it was termed judicial discretion. This meant justice in a larger measure, but it also meant uncertainty. The "socialization of law," as it was sometimes called, necessarily meant the enlargement of judicial discretion. It specially meant this when the legislature dealt, as often happened, with abstruse questions as to which science speaks with uncertain sound. There were sections, phrases and terms in the statute books where the legislature, in effect, said to the courts: "We have no clear meaning; you will have to find one for us." The personal element of the judge counted for more and more—his wide knowledge, his sagacity, his sympathy with the forces that move things with life in its many sides.

This is attractively stated, but in our opinion the committal to the judge of a discretion so wide as in effect to operate as legislation is a retrograde step and should only be resorted to in exceptional cases. A recent writer in the *Central Law Journal*, taking as his text the maxim, "The law is fairer than men," reinforces by weighty general arguments the old rule. Dealing with the favorite argument that the effect of wide judicial discretion would be to make decisions more practical, he points out that "men are in the habit of calling those things practical which are most accessible and may be enjoyed with least effort. Slight reflection should be sufficient to remind them that such things are also earliest to pass away." And he proceeds to show that the basis of law is generalization and that to reduce it to particular ends would be to debase it to selfish aims. The modern charge that the law and its machinery are nothing but a system of reactionary tyranny comes from persons or organizations of them who expect the law to contain nothing but that which they see to be peculiarly advantageous to them, whereas all reasoning men know that security for the law is gone, if it depart from those universal principles which are the guaranty of justice to mankind as a whole. The very gist of the law's justice lies in its universality. His closing observations

are very pertinent: "In the law is justice; but who will say that for selfish, so-called practical men? In the law is found a guaranty of right; but who would seek for such in men? Of the law we are not afraid; in the law we safely put our trust; but outside of it, who will dare to claim the same for men?

DONALD MACKAY.

Glasgow, Scotland.

CARRIER OF PASSENGERS—EJECTION.

LOUISVILLE & N. R. CO. v. HARPER.

Supreme Court of Alabama. June 12, 1919. Rehearing Denied Oct. 23, 1919.

83 So. 142.

Where plaintiff boarded a train with a ticket to F., and before arriving at F. informed conductor that he had decided to go on to W., and conductor directed him to get off at F. and buy a ticket, and he got off, but could not get a ticket because the agent was not in the ticket office, and he could not find him, carrier was liable for damages for ejecting him because he did not pay an excess fare chargeable in addition to the regular fare when the fare is paid in cash.

THOMAS, J. The question is, Had the plaintiff the right to ride upon the train without paying the extra fare required by defendant, if its conductor had informed or arranged with plaintiff that the latter would have a reasonable opportunity to purchase a ticket at Falkville, from that point to Wilhite, and defendant failed to give or provide him such an opportunity.

Under the law the conductor in charge of the train, in the discharge of the duties of his employment, is vested with the power of the defendant company in the collection of fares from passengers, and to that end is its vice principal, and may subject said company to liability for his acts while he is so acting. Republic I. & S. Co. v. Self, 192 Ala. 403, 407, 68 So. 328, L. R. A. 1915F 516; A. G. S. R. R. Co. v. Baldwin, 113 Tenn. 409, 82 S. W. 487, 67 L. R. A. 340, 3 Ann. Cas. 916. Railroad conductors make reasonable arrangement as to passengers transported under their direction, and may inform passengers what will be required of them, and bind the company by such information so given, in the discharge of the duties of their employment. Wright v. Glens Falls, etc., R. R. Co., 24 App. Div. 617, 618, 48 N. Y. Supp. 1,026; Chicago, etc., R. R. Co. v. Burns (Tex. Civ. App.), 104 S. W. 1,081, 1,083; Dwinelle v. N. Y. C. & H. R. R. Co., 120 N. Y. 117, 127, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St Rep. 611.

Plaintiff, testifying, said that he had boarded the defendant's train going south to Falkville, with a ticket he had purchased thereto and which he surrendered to the conductor; and, before arriving at the point of destination, he informed that official that he had decided to go to Wilhite, a point on said road beyond Falkville, and that the conductor directed him to "get a ticket at Falkville"; that on arrival at this place he went to the ticket office (the place provided for the sale of tickets to prospective passengers), but did not find an agent therein; that he looked for the agent without success; that the train started before he was given an opportunity to purchase a ticket, and he returned to the train, and informed the conductor of the absence of the agent and of his inability to purchase a ticket; that he offered to pay the regular cash fare, which he gave the conductor, and that said official, after taking the money, informed plaintiff that he would have to pay the increased cash or "excess fare," and, failing to do so, was put off the train. Witness testified on cross-examination, "I had 5 cents more than the 15 cents" given the conductor, who demanded as the excess cash fare 25 cents, which was more than the witness possessed. Witness further admitted that he did not tell the conductor that he had not the 25 cents demanded as the cash fare, but stated that he "did not get on the train and buy a ticket to Falkville for the purpose of trying to go to Wilhite without paying the excess fare, so as to get a suit against the company"; that the price of a ticket from Falkville to Wilhite was 10 cents.

Defendant's conductor in charge of said train testified that plaintiff had a ticket, and that when he "got to Falkville he got off and ran over to the depot there, and the train was there about a minute"; that, returning, he "jumped on the front end of the smoking car," and asked the plaintiff where he was going, and, after his reply, "told him the fare was a quarter, and he said he would pay 10 cents, but not a quarter"; and witness said he "would have to let him get off, and he did, and that was all. * * *"

Defendant insists that plaintiff made an admission that he knew about the cash fare, and did not tell the conductor whether he had other money or not. This is immaterial to the question of liability vel non for ejecting the plaintiff. The insistence is further made that the

plaintiff was seeking a claim for damages. The record does not sustain this, but shows plaintiff to have been a bona fide passenger to the points in question.

It was not necessary that the fare be paid to establish the relation of carrier and passenger, for if the plaintiff had entered the car in good faith, with the implied invitation or consent of the company's agent, to take passage and with the intention of paying, the relationship is established. B. R. L. & P. Co. v. Bynum, 139 Ala. 389, 395, 36 So. 736; N. B. R. R. Co. v. Liddicoat, 99 Ala. 545, 549, 13 So. 18. In L. & N. R. R. Co. v. Hine, 121 Ala. 234, 237, 238, 25 So. 857, 859, the court said:

"It does not appear from the complaint, however, that there was any rule of the defendant which required absolutely one who has actually obtained such permission to himself exhibit to the conductor the written evidence of such permission. In the absence of notice to the plaintiff of such absolute requirement, he had a right to assume that the defendant's ticket and telegraphing agent knew his duties and would perform them. If, therefore, as appears from the complaint, the plaintiff was induced to board the train and begin the journey disarmed of the written permit by the conduct of the defendant's agent and in reliance upon his advice and his undertaking to give the permit to the conductor, the defendant could not rightfully eject him from the train for failure to exhibit a written permit to the conductor. The carrier cannot shield itself from the consequences of misconduct or mistake on the part of one of its agents, acting within the scope of his duties, which has naturally betrayed another of its agents into the final act of injury to the passenger."

A condition precedent to the enforcement of a regulation exacting extra charges in case of failure to purchase a ticket is that the carrier afford the passenger a reasonable opportunity to purchase a ticket; not so affording, such passenger is entitled to have transportation on payment (or tender for acceptance to the conductor in charge of the train) of the regular fare for his transportation. Kennedy v. B. R., L. & P. Co., 138 Ala. 225, 230, 35 So. 108; Evans v. M. & C. R. R. Co., 56 Ala. 246, 28 Am. Rep. 771; Kozminsky v. Oregon S. L. R. R. Co., 36 Utah 454, 104 Pac. 570, 24 L. R. A (N. S.) notes 758, 761.

The judgment of the circuit court is affirmed. Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

NOTE.—*Ejecting Passenger for Refusal to Buy Tickets Upon Reasonable Opportunity.*—The facts in the instant case are quite scant. At all events they seem to make it the duty of a carcier to hold a ticket office open for the purchase of tickets up to the very last moment before departure of a train. Thus in the instant case the passenger who was ejected for not paying the excess between special and regular fare arrived on the train and went from it to purchase a ticket for the special fare. At most it ought to be thought, that this arriving passenger was not contemplated in the carrier's regulations as a customer from the particular station at which he sought to purchase a new ticket. He at least took chances of the agent not having time to issue to him a new ticket, so that with safety he could board the train. The carrier ought not to be compelled to look to the discretion of its agent selling tickets as to whether it was safe to issue a ticket.

Thus it has been ruled that where a carrier may charge a non-ticket holder an extra charge when a reasonable time has been given to purchase tickets, it is not required to keep a ticket office at a small station open until the very moment a train is starting. Everett v. C. R, I. & P. R. Co., 69 Iowa 15, 28 N. W. 410, 58 Am. Rep. 207.

The rule considered there provided for procuring a ticket "within a reasonable time before the departure of the train." The plaintiff did not start to the station until the train was about to stop and be got there after it came to a full stop. Then the agent at a small station had gone to the platform to attend to other duties. The Trial court instructed the jury that: "Regard should be had to the importance of the station and the number of people who have occasion to purchase tickets there; and the ticket office should be kept open at such time as people in general who travel by rail are in the habit of repairing, and find it convenient to repair, to the station to purchase tickets and get aboard the train." The judgment in favor of the carrier was affirmed.

In State v. Hungerford, 39 Minn. 6, 38 N. W. 628, there was a prosecution for assault by a conductor on a passenger. The defendant pleaded the use of only such force as was necessary to eject the passenger for non-payment of proper fare, an excess above regular ticket fare. The proof showed that prosecuting witness rushed to depot to board a train which had just arrived. He ran to the ticket office but the agent was not in and he boarded the train after it began to move. The court said: "The requirement of a reasonable opportunity to purchase tickets does not make it the company's duty to keep the ticket office open within such time, before the departure of a train, that persons purchasing tickets cannot get on the train before it begins to move. Railroad companies ought not to sell tickets within that time. As a matter of public policy no one except those operating it ought to be permitted to get upon a railroad train when it is in motion." Also it seems to this annotator that an agent can refuse to sell a ticket when applied for so very near this time that fairly he does not think it can be used on a departing train.

In C. R. I. & P. R. Co. v. Brisbane, 24 Ill. App. 463, there was judgment for passenger for not paying train, instead of ticket, fare. Wherefor he was ejected, and this was reversed. The trial court instructed the jury that the railroad should have kept its office open for the sale of tickets up to and until the departure of the train. It was said this was not so but only "for a reasonable time before the departure of each train, but not up to the actual departure." The passenger

"got on the train without a ticket and the train almost immediately thereafter pulled out from the station." He had gotten to the station at the same time the train did and the ticket office was closed.

In Easton v. Waters, 4 Tex. App. 111, 16 S. W. 540, the facts bear a very close resemblance to those in the instant case. The plaintiff was a passenger on the train and left it to purchase a new ticket, requesting the conductor to hold the train until he could purchase it. The court said: "We are of opinion that the evidence fails to show any cause of action for damages."

The same conclusion was reached in So. R. Co. v. Fleming, 128 Ga. 241, 57 S. E. 481, 10 Ann. Cas. 921, where the facts were greatly the same as in the Everett case *supra*. See also Swan v. Manchester, etc., R. Co., 132 Mass. 116, 42 Am. R. 432, for facts on a par with those in the Brisbane case *supra*.

It seems to this annotator that the instant case was wrongly ruled and the logic therefrom excludes reasonable interpretation of a rule or regulation and takes away all discretion in the enforcement thereof. And such lack of discretion militates against safety of the public and needlessly exposes carriers to claims for damages when no public purpose is subserved.

C.

HUMOR OF THE LAW.

The jury, composed entirely of women, had been brought back into the courtroom after ten hours' deliberation.

"And does the jury want instruction from me?" asked the judge solemnly.

"No, your honor. What we want is a pack of cards suitable for a game of bridge," replied the forewoman.—*Yonkers Gazette.*

"This bill of yours is lamentable as regards syntax."

"Didn't we make that high enough?" anxiously demanded Senator Spug.—*Life.*

A North countryman charged with having set fire to a large hayrick was defended on the ground that he was not altogether responsible for his actions. One of the witnesses testified to the belief that the prisoner was "wrang in his heid."

"Can you mention any occasion on which the prisoner behaved in a manner to warrant your statement?" he was asked by the learned counsel.

"Yes," answered the witness. "Once at work he got half a crown too much for his wages, an' "—

"Well?" said the counsel as the witness hesitated.

"He took it back to th' manager," concluded the witness.—*Edinburgh Scotsman.*

"Our Bolsheviki," said Clarence H. Mackay at a dinner in New York, "are ignorant men, and they appeal to ignorant audiences.

"A young cable expert attended, out of curiosity, a Bolshevik meeting on the east side. He listened to a lot of absurd statements. Then, when question time came, he rose and said:

"'You told us a good deal of nonsense about capitalism, the evils of the banking system, the Malthusian law and so forth, but I can't help thinking that you don't know as much about figures as you pretend. How do you find, for instance, the greatest common divisor?'

"The Bolshevik orator pointed his finger at the heckler scornfully, and shouted in a voice of thunder:

"'How do you find the greatest common divisor? Why, I advertise for it, you lunkhead!'

"And then the hall rang with such triumphant applause that the heckler slunk out, quite abashed."—*Washington Star.*

Some time ago a stenographer was taking dictation, in which the expression that a certain transaction had "a badge of fraud on its face" was used.

The stenographer, in transcribing her notes, must have been puzzled by the intricacies of legal expression, for she wrote it thus: "This transaction had a bag of frogs on its face."

One hot day the federal prosecutor was examining a witness in Judge Landis' court, and wasn't making much progress. The witness was an itinerant printer.

"Where were you working in January of that year?" asked the prosecutor.

"On the Texarkana Bugle," replied the witness.

"How long did you stay?"

"Two months."

"Why did you leave?"

"The editor and I disagreed on a great national question."

"Where did you work next?"

"On the Joplin News-Herald. I was there seven weeks."

"Why did you leave?"

"The editor and I disagreed on a great national question."

Three other jobs were mentioned, and each time the printer explained his leaving with the same phrase. Then Judge Landis sat up in his chair and raised a hand.

"Wait a minute," he commanded. "What was this great national question?"

"Prohibition," said the witness.—*Cartoons Magazine.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bankruptcy**—Secured Debt.—The lien on all property of judgment debtor in the county, which Code Civ. Proc. Cal. § 674, provides that filing of transcript of judgment gives, is enough to make the judgment creditor a "secured creditor," within Bankruptcy Act.—Oilfields Syndicate v. American Improvement Co., U. S. C. C. A., 260 Fed. 905.

2. **Bills and Notes**—Burden of Proof.—Where there was evidence to show that notes sued on were obtained by fraud, plaintiff, a subsequent holder, has the burden of proving that it was a bona fide holder for value.—Mechanics' Saving Bank v. Feeney, N. H., 108 Atl. 295.

3.——Consideration.—The postponement of the obligation on a note to a future date is a new consideration moving to the maker and operates as a present consideration for execution of a new note by him.—Katz v. Judd, Wash., 185 Pac. 613.

4.——Innocent Holder.—If the transaction in which a note originated were tainted with illegality in that it involved the holding of a lottery by the maker of the note to dispose of the property for which he gave it to the payee, the fact would not prevent recovery on the note by an innocent holder for value.—Whitman v. Fournier, Mass., 125 N. E. 303.

5.——Negotiability.—The negotiability of a note is not impaired because the payee and indorser on transferring the same guarantees payment.—Ambrose v. Hammond Lumber Co., Cal., 185 Pac. 691.

6.——Restrictive Indorsement.—An indorsee under restrictive indorsement takes a title qualified either as to person or use, and the delivery of the instrument gives effect to the indorsement, and it passes to the indorsee subject to all the restrictions imposed, in view of St. 1917, § 1676—17.—Gulbranson-Dickinson Co. v. Hopkins, Wis., 175 N. W. 93.

7. **Brokers**—Bringing About Sale.—A broker is entitled to his commission, where he was the means of finding a purchaser and bringing about negotiations leading up to the sale of land, though he was not present or partaking in the actual sale.—Hodges v. Ramsey, Mo., 216 S. W. 568.

8. **Burglary**—Occupancy.—It is not necessary that there should be someone actually living in the house in order to constitute "occupancy."—Carneal v. State, Texas, 216 S. W. 626.

9. **Chattel Mortgages**—Shifting Stock.—Where a chattel mortgage is given upon a shifting stock of merchandise, the mortgage should identify the chattels with such particularity that they can be determined without difficulty and uncertainty.—Miller v. Scarbrough, Wash., 185 Pac. 625.

10.——Waiver of Lien.—An attachment of mortgaged chattels, in a suit to enforce the mortgage debt, is a waiver of the lien.—M. Steinert & Sons Co. v. Reed, Me., 108 Atl. 334.

11. **Contracts**—Impossibility of Performance.—A contract, valid in its inception, may become voidable or impossible of performance by the failure of a subsequent contingency; but, if the contingency is one which may happen, the parties are bound by their contract until it can be determined it cannot be enforced.—Nannizzi v. Caprile, Cal., 185 Pac. 673.

12.——Modification of Parol.—A written agreement may be modified by a subsequent parol contract, notwithstanding the general rule embodied in L. O. L. § 713.—Propst v. William Hanley Co., Ore., 185 Pac. 766.

13.——Ratification.—There can be no ratification of a contract, where the one who has the power of ratification is ignorant of the facts, and in such case the doctrine of constructive knowledge has no application.—Berkshire v. Holcker, Mo., 216 S. W. 556.

14.——Rescission.—Rescission of an executed contract for fraud will not be denied because plaintiff cannot place defendant in statu quo, if equity can still be done between the parties.—Spencer v. Deems, Cal., 185 Pac. 671.

15.——Restraint of Trade.—A contract not to re-engage in a certain business is enforceable, providing the restraint of trade involved is reasonable and not so extensive as to affect the public interest.—Keen v. Ross, Ky., 216 S. W. 605.

16. **Corporations**—Joint and Several Liability.—If a stockholder was defrauded in the sale of stock to him by the president of the company acting as its selling agent for commission, the president and the company were both jointly and severally liable to him.—Denis v. Nu-way Puncture Cure Co., Wis., 175 N. W. 95.

17.——Repurchase of Stock.—Where defendant seller of corporate stock unqualifiedly re-

fused to repurchase it pursuant to an alleged agreement, plaintiff buyer was not required to tender the stock certificate before bringing suit. —Vrba v. Krall, Iowa, 175 N. W. 4.

18. **Criminal Law**—Accomplice.—The testimony of an accomplice is legal testimony, and a conviction may be founded upon it alone and sustained; but such evidence is open to grave suspicion, and should be acted on with the utmost caution.—People v. Pattin, Ill., 125 N. E. 248.

19.——Irresistible Impulse.—The doctrine that a criminal act may be excused or mitigated upon the notion of an irresistible impulse to commit it, where the offender had the mental capacity to appreciate his legal and moral duty in respect to it, has no place in the law.—State v. Carrigan, N. J., 108 Atl. 315.

20.——Part of Conversation.—Generally, when a part of a conversation is called out by one party, the other party has the right to all of such conversation.—People v. Baker, Ill., 125 N. E. 263.

21.——Voluntary Intoxication.—Mental unsoundness, produced by voluntary intoxication, even where it is so pronounced as to exhibit entire prostration of the faculties of defendant, is no defense against a criminal charge of atrocious assault and battery.—State v. Marriner, N. J., 108 Atl. 306.

22. **Customs and Usages**—Implied Reference to.—Where defendant claimed that a contract of reinsurance was affected by custom, the custom must be clearly established, or shown to have been reasonable, definite, and uniform, before it will be presumed that the parties referred to it in making the contract.—American Guaranty Co. v. American Fidelity Co., U. S. C. C. A., 260 Fed. 897.

23. **Death**—Eye Witnesses.—One killed in an accident occurring in the absence of witnesses is presumed to have exercised reasonable care for his own safety.—Stukas v. Warfield, Pratt, Howell Co., Iowa, 175 N. W. 81.

24. **Dedication**—Plats.—Deed referring to a plan of platted lots and streets conveyed by one of the delineated streets carried to the public an incipient dedication of the streets.—Harris v. City of South Portland, Me., 108 Atl. 326.

25. **Deeds**—Repugnancy.—When a deed contains a general description, followed by a particular description of the premises granted, the latter will control the former.—John L. Roper Lumber Co. v. Hinton, U. S. D. C., 260 Fed. 996.

26.——Repugnancy.—If there is a repugnancy between the granting clause of a deed and the habendum, the former will control the latter so as not to defeat the grant.—Jackson v. Lady, Ark., 216 S. W. 505.

27. **Fraud**—Misrepresentation.—The misrepresentation to a vendee by the agent of the vendor, or by the vendor himself, of the cost to the vendor of land, made to induc the vendee to purchase, is a misrepresentation of a material fact, which, if relied upon by the vendee, to his damage, constitutes actionable fraud.—Wine v. U. S., U. S. C. C. A., 260 Fed. 911.

28. **Fraudulent Conveyances**—Fraud in Law. —A debtor's transfer of property to his wife without consideration, thereby placing all of his property subject to be taken by creditors beyond their reach, amounts to a fraud in law; the intent of the wife in accepting the transfer being immaterial.—Lowell-Woodward Hardware Co. v. Davis, Kansas, 185 Pac. 732.

29.——Voluntary.—Conveyances without consideration and to protect the property, made by a judgment debtor to his wife, before creation of debt and rendition of judgment, and, after judgment, by the debtor and his wife to the debtor's brother, who reconveyed to the debtor as trustee for his daughter, were fraudulent and void, under Ky. St. § 1906, as to the debtor's creditors, past, present, and prospective.—Ball v. Brown-Ross Shoe Co., Ky., 216 S. W. 612.

30. **Fixtures**—Annexation to Freehold.—A chattel does not become a fixture unless physically or constructively annexed to the freehold. —Hanson v. Voss, Minn., 175 N. W. 113.

31. **Eminent Domain**—Additional Burden.— Where, by the construction of its telegraph line on a railroad right of way, defendant imposed an additional burden on the fee, the owner of the fee, which was subject to the easement of the railroad, is entitled to compensation for the additional burden.—Query v. Postal Telegraph-Cable Co., N. C., 101 S. E. 390.

32.——Petition for Condemnation.—Petition filed by a city to condemn land, alleging that it is to be used to widen a certain street, which, when widened, will be used as a public street, and that it is necessary therefor, sufficiently alleges the public character of the use and the necessity therefor.—City of Huntington v. Frederick Holding Co., W. Va., 101 S. E. 461.

33. **Gifts**—Causa Mortis.—To constitute a "gift causa mortis," there must be a delivery or transfer of the property in expectation of death from an existing illness.—In re Meyer's Estate, Ind., 125 N. E. 219.

34. **Guaranty**—Presumption.—In every doubtful case, the presumption is against a continuing guaranty.—National Surety Co. v. Campbell, Wash., 185 Pac. 602.

35.——Release of Guarantor.—A guarantor of payment of a note is not released by mere failure to protest or give notice of nonpayment of the same.—Citizens' State Bank of Mt. Vernon v. Hendrix, Iowa, 175 N. W. 17.

36. **Highways**—Equal Rights in.—An automobile driver and motorcyclist have equal rights to lawfully use public highways, and each may assume the other will exercise ordinary care, and not carelessly expose to danger or negligently injure the other.—Lemmon v. Broadwater, Del., 108 Atl. 273.

37. **Homestead**—Conveyance of.—A homestead of a husband and wife cannot be conveyed except by a written instrument jointly executed by both.—Robison v. Robison, Iowa, 175 N. W. 9.

38. **Homicide**—Aggressor.—A person instigating a quarrel by his own wrongful act forfeits his right to plead self-defense, and a challenge, assault, or insult reasonably calculated to provoke an assault is usually regarded as sufficient provocation.—Jones v. Com., Ky., 216 S. W. 607.

39.——Malice.—Malice is an essential element of murder. If one charged with crime, while resisting arrest by an authorized officer or in

attempting to escape, maliciously kills or fatally wounds the officer, the homicide is murder.—State v. Weisengoff, W. Va., 101 S. E. 450.

40. **Husband and Wife**—Agency.—The relation of agency between husband and wife is governed by the same rules which apply to other agencies.—Milhollin v. Milhollin, Ind., 125 N. E. 217.

41.——Community Property.—Separate property, acquired in a state where community property is unknown, does not become community property, but remains separate property when transported into a community property state.—Bosma v. Harder, Ore., 185 Pac. 741.

42.——Entireties.—When a husband and wife take an estate by the entirety they hold, not as separate individuals and by moieties, but as one person, each holding the whole of it, and on the death of either the entire estate belongs to the survivor.—Lomax v. Cramer, Mo., 216 S. W. 575.

43.——Separate Maintenance.—The wife may maintain an action for separate maintenance and support without asking for divorce.—Shipley v. Shipley, Iowa, 175 N. W. 51.

44. **Indians** — Spoliation. — As the United States, as guardian of the Indians, has the duty to protect them from spoliation, and therefore right to prevent them being illegally deprived by excessive taxation of the rights conferred by Act June 28, 1906, as to distribution of lands of the Osage Indians, officers of the United States can invoke relief for the accomplishment of that purpose.—U. S. v. Board of Com'rs of Osage County, Okla., U. S. S. C., 40 S. E. 100.

45. **Injunction**—Multiplicity of Suits.—Equity will grant an injunction to prevent a multiplicity of suits; the question of whether, in a particular case, equity will assume jurisdiction, depending, if case is not covered by a controlling precedent, upon the merits of the particular case, the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the parties, the points to be contested, and the result to follow as to whether the interests of any of the parties will be unreasonably overlooked or obstructed.—Houston Heights Water & Light Ass'n v. Gerlach, Texas, 216 S. W. 634.

46.——Trade Secrets.—The law recognizes a property right in trade secrets and confidences, and a court of equity, when its jurisdiction is properly invoked, may enjoin one in whom a confidence has been reposed from divulging them to third persons or from himself taking advantage of them to owner's injury, and obligation not to divulge exists in case of an employe, in the absence of contrary stipulation.—Morrison v. Woodbury, Kan., 185 Pac. 735.

47. **Insurance**—Constitution and By-Laws.—The laws of a benefit association are binding upon all its members, and all are conclusively presumed to know them.—Miller v. Supreme Tent of Knights of Maccabees of the World, Wash., 185 Pac. 593.

48. **Intoxicating Liquors**—War-Time Prohibition.—The War-Time Prohibition Act was not repealed by adoption of the Eighteenth Amendment, by its terms to become effective one year after its ratification, on the theory that it impliedly guaranteed liquor dealers a year of grace.—Hamilton v. Kentucky Distilleries & Warehouse Co., U. S. S. C., 40 Sup. Ct. 106.

49. **Judgment** — After-acquired Rights. — A judgment does not affect after-acquired rights, nor preclude a party from availing himself of them.—Seastrand v. D. A. Foley & Co., Minn., 175 N. W. 117.

50.——Default.—A judgment by default, or by consent, or one rendered in action in which usury was not in fact pleaded or put in issue as a defense, does not bar the judgment debtor from thereafter setting up the defense of usury against the judgment, when it is sought to be enforced in a court of equity.—Ruckdeschall v. Seibel, Va., 101 S. E. 425.

51.——Reopening.—The court has jurisdiction to reopen a judgment during the term in which rendered and hear further testimony.—Kretchmer v. Kretchmer, Iowa, 175 N. W. 8.

52. **Larceny**—False Pretenses.—The distinction between larceny and false pretenses is that in larceny the owner of a thing has no intention to part with his property to the person taking it, although he may intend to part with possession, while in false pretenses the owner does intend to part with the property, but it is obtained from him by fraud.—People v. Shwartz, Cal., 185 Pac. 686.

53.——Hope of Gain.—In prosecution for the larceny of a steer, proof that defendant gave away the beef after he had killed the steer was sufficient evidence of casus lucri, even if that were an essential element of crime of larceny in Florida.—Adams v. State, Fla., 83 So. 271.

54.——Ownership.—Owner of a farm, on which corn stolen was raised by a tenant on shares, had such ownership in the corn, although undivided, as would support an indictment for larceny of the corn.—State v. Taylor, Del., 108 Atl. 280.

55. **Libel and Slander**—Printed Defamation.—Printed defamation is more potent than spoken, because more permanent.—Stanley v. Prince, Me., 108 Atl. 328.

56. **Limitation of Actions** — Discovery of Fraud.—An action for fraudulently misrepresenting the value of land sold is not barred if brought within three years, after plaintiff's discovery of the fraud, provided he acted prudently.—Morrison v. Hartley, N. C., 101 S. E. 375.

57.——Tolling Statute.—When the statute of limitations starts to run during the lifetime of an ancestor, it does not stop as against an heir, even though the heir is under disability at the death of the former, and at the time of descent cast.—White v. Scott, N. C., 101 S. E. 369.

58. **Marriage** — Illicit Cohabitation.—Cohabitation, illicit in its inception, will be presumed to continue so.—Illinois Steel Co. v. Industrial Commission, Ill., 125 N. E. 252.

59.——Slaves.—Where a negress was married while a slave, but continued to live with her husband after emancipation, the marriage became legal.—Wiley v. Stewart, La., 83 So. 260.

60. **Master and Servant**—Dependency.—That a deceased minor servant gave his wages to his father, in aid of him and his children, constituted the father an actual "dependent" within the Workmen's Compensation Act.—Colucci v. Edison Portland Cement Co., N. J., 108 Atl. 313.

61.——Earning Capacity.—The Workmen's Compensation Act does not give compensation for loss of a member, but for the loss of earning capacity actually caused by the loss of the limb.—Centlivre Beverage Co. v. Ross, Ind., 125 N. E. 220.

62.——Principal's Direction.—If the danger of carrying a tie to top of a steep and slippery embankment with insufficient help was not such as to threaten immediate injury, and the servant by reason of his foreman's order was led to believe that he could carry his part by the use of care, and he proceeded to do the work with the exercise of care, he is not barred from recovering.—Tull v. Kansas City Southern Ry. Co., Mo., 216 S. W. 572.

63.——Scope of Employment.—A master is responsible for the torts of his servant only when they are committed within the scope of the employment.—Figone v. Guisti, Cal., 185 Pac. 694.

64.——Wrongful Discharge.—One employed to render personal service to another for a specific term is entitled to recover damages for the breach of his contract if he is discharged, without sufficient cause, before the expiration of

the term.—Davis v. Laurel River Lumber Co., W. Va., 101 S. E. 447.

65.——Wrongful Discharge.—A corporation's buyer and manager, employed by contract under seal at a salary of $100 per week, terminable on six months' notice, and wrongfully discharged without notice, could not maintain actions of debt to recover weekly instalments of salary for the six months' period for which his contract entitled him to notice; the damages being unliquidated, as capable of reduction by whatever might have been earned in other employments.—Ogden-Howard Co. v. Brand, Del., 108 Atl. 277.

66. **Malicious Prosecution**—Bad Character.—In an action for malicious prosecution, proof of the general bad character of the plaintiff is admissible on the measure of damages, where damages for mortification and disgrace are sought; but the reputation sought to be shown must be bad in the same respect in which his reputation was, or otherwise would have been injured by the malicious prosecution.—Boyers v. Lindhorst, Mo., 216 S. W. 536.

67.——Burden of Proof.—To maintain an action for malicious prosecution, one must show that the prosecution has ended in his favor.—McLaughlin v. Lehigh Valley R. Co., N. J., 108 Atl. 309.

68. **Mechanics' Liens**—Subcontractor.—A subcontractor on a building which has perfected its lien for work, labor, and material furnished, tractor's assignment to a bank of funds or the greater part before the date of the conpayments due, has a prior and superior right to payment from such funds over that of the bank.—Neil & Co. v. Sedlachek, Wis., 175 N. W. 89

69. **Mines and Minerals**—Partnership.—A partnership to secure a block of oil and gas leases, and to drill a test well to develop field and enable partnership to dispose of the leases, in pursuance of which one test well was drilled, producing but small amount of gas, held a general and not a mining partnership.—Snider v. Davidson, Kan., 185 Pac. 724.

70. **Mortgages**—Deed Absolute.—A deed absolute upon its face may be shown by parol evidence to have been intended as a mortgage, without alleging fraud, accident, or mistake.—Sutton v. Hardison, Ky., 216 S. W. 609.

71.——Rents.—Where mortgage does not expressly pledge rents, etc., of mortgaged premises as further security, the rents accrued prior to appointment of a receiver in a foreclosure proceeding on application of second mortgagee belong to mortgagor or the owner of the fee.—Stewart v. Fairchild-Baldwin Co., N. J., 108 Atl. 301.

72. **Municipal Corporations** — Governmental Power.—Though neither counties nor the state nor its governmental agencies can be sued in tort, one whose personal porperty has been wrongfully taken, damaged, or converted to the county's use may waive the tort and sue upon an implied contract to pay for such property.—Nelson County v. Coleman, Va., 101 S. E. 413.

73. **Negligence**—Performance of Duty.—Any liability for negligence must rest upon the existence of a duty, which must arise out of a relation between the parties, and a negligent failure to perform the duty.—Mercer v. Meinel, Ill., 125 N. E. 288.

74. **Patents** — Description of Elements.—Where the language of a claim includes elements described in general terms, the court may look to the specification for the purpose of construing the language and ascertaining its meaning.—I. T. S. Rubber Co. v. Panther Rubber Mfg. Co., U. S. C. C. A., 260 Fed. 934.

75.——Novelty.—The Bone patent, No. 705,732, for a retaining wall of reinforced concrete, with a heel such that the weight of the earth thereon tends to keep the wall erect, held, under Rev. St. § 4868, in view of prior patents and description of the device in foreign printed publications, to contain no patentable novelty, except, perhaps, in its special form, and in that respect not infringed.—Bone v. Commissioners of Marion County, U. S. S. C., 40 Sup. Ct. 96.

76.——Utility.—That a patented process for manufacturing steel was used, and that a large manufacturer, through its officers, having the fullest knowledge of the science and art and having at their command the best experts, paid a large sum for infringement and right to use, is strong evidence of utility.—Chruchward International Steel Co. v. Bethlehem Steel Co., U. S. C. C. A., 260 Fed. 962.

77. **Principal and Agent**—Scope of Agency.—An act which an agent is not expressly authorized to do may bind his principal if it is necessary to enable him to effectuate the purpose for which the agency is established.—Davison v. Parks, N. H., 108 Atl. 288.

78. **Principal and Surety**—Release of Surety.—Where money is used by the owner to liquidate demands for which if unliquidated he would be liable, the contractor's surety is not released on its bond, even though the stipulated percentage of amounts due are not withheld by the owner as security.—Harvey v. George, Mich., 175 N. W. 140.

79. **Railroads** —Contributory Negligence.—A motorman's act in driving an electric car through a dense fog at such a speed that he could not stop within the range of his vision, with knowledge that freight cars of another company might be on the track, held to constitute contributory negligence precluding recovery for damages to the car by a collision.—North Coast Power Co. v. Cowlitz, C. & C. Ry., Wash., 185 Pac. 615.

80.——Trespasser.—A railroad owes no duty to a trespasser on its track, except not to wilfully or wantonly injure him after discovering his presence there.—Hubbard v. Southern Ry. Co., Miss., 83 So. 247.

81. **Reformation of Instruments**—Conformity to Oral Agreement.—The basic principle upon which reformation of a written instrument is allowed is that the writing does not express the prior oral agreement upon which it is founded.—Heard v. Nancolas, Iowa, 175 N. W. 13.

82. **Robbery**—Force and Intimidation.—"Robbery" is the felonious and violent taking of money, goods, or other valuable things from the possession of another by force or intimidation, and is punishable by imprisonment in the penitentiary not less than one and not more than fourteen years.—People v. Jones, Ill., 125 N. E. 256.

83. **Sales**—Delivery.—Generally, delivery of personal property at the place agreed on or designated by the buyer is a completed delivery.—Fiske v. H. E. Dunbar & Co., Me., 108 Atl. 324.

84.——Misrepresentation.—If representations inducing a sale were material and false, and the maker knew or should have known that they were false, or made them recklessly without knowledge, and the injured party relied on them as true without present means of knowledge of their falsity, and suffered damage, he was defrauded in the legal sense.—Denis v. Nu-Way Puncture Cure Co., Wis., 175 N. W. 95.

85.——Offer and Acceptance.—For a contract of purchase to become effective when entered into by mail, the offer to sell must be accepted by buyer unequivocally, unconditionally, and without any variance.—Dunn v. Freeman, Ga., 101 S. E. 393.

86. **Street Railroads**—One-Man Car.—An ordinance requiring every street car to be operated by a conductor and motorman, subject to penalty for violation, is presumed a lawful exercise of the police powers for public safety, and, notwithstanding a contested claim of safety of a one-man car, cannot be held unconstitutional, in the absence of a shownig of a clear case of arbitrary conduct on the part of the local authorities.—Sullivan v. City of Shreveport, U. S. S. C., 40 Sup. Ct. 102.

87. **Wills** — Attestation. — Where attesting witnesses signed after attorney who had drawn will had stated in testator's presence and hearing that testator wished them to attest will, and after testator had himself signed will, there was a publicaion of will, there having been, in effect, a declaration by testator that it was his last will.—Lohmann v. Lohmann, Mo., 216 S. W. 518.

88.——Laches.—An attack on the validity of a will disposing of testator's entire estate comes too late when made nearly 13 years after his death.—Gerke v. Citizens' State Bank of Spencerville, Ind., 125 N. E. 238.